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Criminal Law--Implied Contract--Person Obtaining Embezzled Money Through a Wager Does Not Acquire Title to Same as Against True Owner (Hartford Accident and Indemnity Co. v. Benevento, 44 A.2d 97 (N.J. 1945))

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CRIMINAL LAW — IMPLIED CONTRACT — PERSON OBTAINING EMBEZZLED MONEY THROUGH A WAGER DOES NOT ACQUIRE TITLE TO SAME AS AGAINST TRUE OWNER.—A bank teller embezzled money from the bank and used the money to make wagers with the defendant, a bookmaker. The defendant would appear at the teller's window, whereupon he would be handed an envelope containing the money and a list of horse racing selections. In the inception the bets were never more than twenty dollars. Later, however, the wagers increased as high as one thousand dollars daily. These larger sums were embezzled moneys. The assignee of the bank sued to recover the funds of the depositary which had been transferred to the bookmaker. *Held,* restoration ordered. One who takes embezzled money by virtue of wagers does not acquire good title to it as against the one from whom the money was stolen, even though he had no knowledge of the embezzlement. *Hartford Accident and Indemnity Co. v. Benevento,* — N. J. L. —, 44 A. (2d) 97 (1945).

The defendant contended that he had no knowledge of the embezzlement and that when money obtained through the perpetration of a felony is transferred to an "honest taker", the latter acquires good title to the same as against the lawful owner, if the "honest taker" has no knowledge of the embezzlement. But a party cannot be willfully blind to the import of facts sufficient to put an ordinary prudent man upon inquiry. Such a willful blindness is fraudulent and is not sustainable in equity and good conscience.[1] The nature of the action for money had and received is an equitable action in spirit although legal in form.[2] Conceding the fact that the defendant lacked knowledge he would nevertheless be devoid of title to the money. It is elementary that at the common law one who steals property cannot pass good title to that property. And since gambling is unlawful by statute [3] the transfer of title is not effected by the mere delivery of money upon a wager.[4] The transferee holds the money without any other right or duty respecting it than to return it on demand to the lawful owner, enforceable by an action of *indebitatus assumpsit* for money had and received.[5]

The defendant then contended that the right given by statute [6] to the loser to regain his lost moneys was a personal right limited by a statutory time limit and was not assignable. But the court held

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[1] United States Steel Corp. v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1 (1903).

[2] United States v. Jefferson Electric Manufacturing Co., 291 U. S. 386, 78 L. ed. 859 (1934).

[3] N. J. R. S. § 2:57-1: "All wagers, bets or stakes made to depend upon any race or game . . . shall be unlawful"; *cf.* N. Y. PENAL CODE § 994.

[4] Van Pelt v. Schauble, 68 N. J. L. 638, 54 Atl. 437 (1903).

[5] *Ibid.* Huncke v. Francis, 27 N. J. L. 55 (1858).

[6] N. J. R. S. § 2:57-5: "If any person shall lose any money . . . and shall pay or deliver the same . . . to the winner . . . such person may sue for and recover such money . . . ; but such suit shall be brought within six calendar months after payment or delivery as aforesaid"; *cf.* N. Y. PENAL CODE § 995.

that the right of action arose out of implied contract on the part of the depositary to return the money to the lawful owner, and all choses in action arising out of contract are assignable. The statute did not change the manner in which the right arose, it simply gave the loser whose right of action previously was unenforceable because he was in *pari delicto* with the winner, an opportunity to repent and recover his losses.[7] The assignee, however, is not in *pari delicto* with the winner and therefore the statutory limitation as to recovery of gaming losses by the loser is inapplicable.

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[7] Van Pelt v. Schauble, 68 N. J. L. 638, 54 Atl. 437, cited *supra* note 4.